

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA

v.

Case No. 8:03-CR-77-T-30TBM

HATEM NAJI FARIZ
_____ /

**RESPONSE OF HATEM NAJI FARIZ
TO MOTION OF MEDIA GENERAL OPERATIONS
FOR LEAVE TO INTERVENE AND FOR ORDER
ESTABLISHING GUIDELINES FOR MEDIA ACCESS**

Defendant, Hatem Naji Fariz, by and through undersigned counsel, files the following response and objections to Media General Operations’ (hereinafter referred to as “the Tribune”) Motion for Leave to Intervene and for Order Establishing Guidelines for Media Access.

Media General Operations is the apparent parent company for various media outlets including but not limited to the Tampa Tribune, WFLA-TV and tbo.com¹. The Tribune, and ostensibly the other related media outlets, request permission to inspect and copy all physical and documentary evidence published to the jury or admitted into evidence in the trial of the instant mater, including, without limitation, audiotapes and videotapes, photographs, transcripts of recordings and translations. Additionally, the Tribune seeks access to juror

¹The Tampa Tribune not only shares physical facilities with WFLA-TV and tbo.com but also maintains and sponsors tbo.com. This website has active links to WFLA-TV broadcast archives and Tampa Tribune current and archived articles.

selection and jury information, as well as transcripts of bench conferences, sidebars and in chamber hearings. Access to the latter is not premised on the publication of these matters or its introduction into evidence.

Factual Background

The instant case and its relationship to news accounts, investigative journalism and political sensationalism promulgated by various media outlets is arguably unprecedented. Special Agent William West with Immigration and Naturalization swore in his November 1995 affidavit that he initiated an INS records check in response to having read published newspaper articles which identified Al-Arian as the founder of two organizations that provide support to terrorist groups, specifically the Islamic Jihad and Hamas. Years later, Senior Special Agent David Kane of the United States Customs Service reiterated Special Agent West's reliance on published newspaper articles as investigative triggers in his March 2002 affidavit in support of search warrants to be issued in the Eastern District of Virginia. In September of 2001, on a popular Fox News channel talk show called *The O'Reilly Factor*, host Bill O'Reilly advised guest Sami Al-Arian that "with all due respect...if I was the CIA, I'd follow you wherever you went. I'd follow you 24 hours..." The Tribune, through its affiliated website tbo.com, maintains a specific link entitled *Terrorism in Tampa?* This site includes numerous links to terrorism related matters, many unrelated to Sami Al-Arian, e.g., a graphics gallery that describes the United States' most recent invasion of Iraq; matters only tangentially related to Dr. Al-Arian, e.g., a link to the aforementioned David Kane affidavit; and finally, matters

strictly slanted in support of the instant prosecution, e.g., a multimedia link to Attorney General John Ashcroft's press conference announcing the original indictment and Dr. Al-Arian's condemnation and firing by the University of South Florida. Throughout Florida's 2004 primary and general election campaigns, WFLA-TV and other television and radio stations accepted and transmitted advertisements by United States senatorial campaigns accusing Dr. Al-Arian of being a terrorist.

These circumstances serve to represent the nature of supplemental media coverage to that which must also be described as widely publicized and sensational. These matters necessarily contributed to the nearly universal recognition of Dr. Sami Al-Arian amongst the approximate 325 potential jurors who responded to the court's preliminary anonymous questionnaire and to an overwhelming distrust and animus toward Dr. Al-Arian, Muslims, Arabs and Palestinians. Many potential jurors also stated their personal and familial fear of having to sit in judgment of potential "terrorists." These fears mirrored the United States Marshal's concerns of potential jury tampering or intimidation.

Generally, the public does enjoy a First Amendment right of access to criminal trials. However, right of access to judicial records is not of a constitutional dimension; thus, the trial court is left to its broad discretion in deciding whether to allow inspection and copying of judicial records.² This discretion is to be exercised in light of the relevant facts and

²In addition to United States Supreme Court and 11th Circuit precedent affording broad discretion to the trial court, Local Rule 4.10(g) of the Middle District of Florida also addresses these

circumstances. A presumption of openness attaches to judicial records and the presumption in favor of public access must be balanced against any competing interest advanced.

Hatem Fariz, in response therefore, asserts his Sixth Amendment interests in a fair trial.

Memorandum of Law

The first amendment guarantees the public and the press the right to attend criminal trials unless it is demonstrated that some curtailment of that right is required “to protect defendant’s superior right to a fair trial or that some overriding consideration requires closure.” *U.S. v. Chagra v. San Antonio Light Division of the Hearst Corp.*, 701 F.2d 354 (5th Cir. 1983) citing *Richmond Newspapers v. Virginia*, 448 U.S. 555, 564(1980). “Papers filed with the court, records of court activity, exhibits received at hearings and trials and orders and judgments entered by the court are all records normally accessible by the press and public. The Supreme Court included such records within the general common law right to inspect and copy public records and documents...(however) the Court also held that this common law right was subject to the supervisory power of each court to limit access to protect other interests”. *U.S. v.*

instances:

(g) In a widely publicized or sensational case, the Court on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the Court may deem appropriate for inclusion in such an order.

McVeigh, 918 F.Supp 1452, 1462 citing *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978). The interests to be protected, restated, is the defendant's superior right to a fair trial. The Supreme Court has also described the press and public's right to access to trials as a qualified constitutional right. *Globe Newspaper Co. V. Superior Court*, 457 U.S. 596, 606-07(1982).

The Eleventh Circuit, relying on the dictates of *Globe Newspaper* and two subsequent Supreme Court rulings, *Press Enterprise Co. v. Superior Court of California for Riverside County*, 464 U.S. 501(1984) (*Press Enterprise I*) and *Press Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1 (1986)(*Press Enterprise II*) upheld the trial court's limitations on press access to judicial proceedings and documents in *U.S. v. Valenti*, 987 F.2d 708 (1993). In *Valenti*, the Times Publishing Company filed a motion to intervene in a criminal matter involving Charles Corces and John Valenti. Prior to the trial, numerous closed proceedings took place including *ex parte* conferences and *in camera* hearings some of which involved the receipt of testimony and exhibits. A *St. Petersburg Times* reporter requested a transcript of a particular hearing and access to all further proceedings. The *Times* eventually filed formal pleadings seeking the same. The trial court denied that portion of the *Times'* request asking that transcripts of the proceedings be unsealed and made available. The *Times* appealed the trial court's order.

The *Times* argued that pursuant to *Press-Enterprise I* and *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983), the trial court had abused its discretion in conducting

closed bench conferences and refusing to unseal disputed transcripts and *in camera* documents. The Eleventh Circuit citing its previous ruling in *U.S. v. Gurney*, 558 F.2d 1202 (5th Cir. 1977) found that the trial court had not abused its traditional authority to conduct closed bench conferences. *Gurney*, the court pointed out, held that “bench conferences between judge and counsel outside of public hearing are an established practice, ... and protection of their privacy is generally within the court’s discretion.” *Valenti* at 713.³

The Eleventh Circuit noted that even where a court properly denies public and the press access to portions of a criminal trial, the transcripts of properly closed proceedings must be released when the danger of prejudice has passed. *Id* at 714. Here the trial court had identified a substantial probability of irreparable damage to a continuing law enforcement investigation as the compelling interest requiring denial of the Time’s motion for access. In *Gurney*, the Eleventh Circuit recognized court’s discretion and responsibility “to ensure the accused receive a fair, orderly trial comporting with fundamental due process ... (and devoid of) prejudicial or inflammatory publicity” as appropriate grounds to restrict the proceedings. *Gurney* at 1209-1210. These restrictions

³It should be noted that the Tribune’s brief cited *In re Baltimore Sun Co.*, 841 F.2d 74(4th Cir. 1988) in support of its assertion that it be provided access to all facets of the jury selection process and juror information. The Fourth Circuit ruled that access to juror information was the press and public’s legitimate right. However, astonishingly, the Fourth Circuit expressly recognized that its ruling was inconsistent with the Fifth Circuit (now the 11th) in light of *Gurney*. The fact that this distinction existed then and exists today, but was not disclosed in the Tribune’s brief is unconscionable.

include the “well-established practice” of refusing to publicly release the jury list; complete denial of exhibits prior to their introduction into evidence and then reasonable conditions on examination of exhibits after their introduction.⁴ *Id at* 1210 nn.12,13.

Conclusion

Having previously objected to the Court’s use of the anonymous jury questionnaire, counsel for Mr. Fariz now acknowledges its unquestionable benefit. In making the determination to utilize anonymous questionnaires, this Court, relying on a report authored by the United States Marshal’s Service, found the necessary basis for restricting juror information. Having now enjoyed the benefit of reading the jurors’ responses, the scope and influence of the press on the local venire is clear. Dr. Sami Al-Arian was known to nearly every potential juror. More importantly, a great majority of potential jurors cited familiarity with the instant case and, more often than not, had developed opinions as to Dr. Al-Arian as a person in general and as an individual accused of criminal behavior. Hatem Fariz, potentially liable as a co-conspirator of Dr. Al-Arian, may suffer the fallout of ongoing prejudicial and inflammatory reporting. Therefore, reasonable restrictions designed to protect the defendants’ right to a fair, orderly trial are clearly warranted. Hatem Fariz prays this court limit the Tribune’s request for access to audiotapes, videotapes and translations admitted into evidence or published to the jury to that which can be accomplished reasonably by the clerk’s office. Hatem Fariz further

⁴ Additionally, national security has been deemed a compelling interest in support of denying access to judicial documents. *United States v. Ressam*, 221F.Supp.2d 1252(W.D.Washington 2002)

asks the court to deny the Tribune's request for juror information above that which already exists. There exists no precedent for the press or public to receive information superior to that of the parties. Moreover, the defendants' right to a fair jury rests in great part on a petite jury comfortable in its ability to convene and deliberate securely. The ongoing anonymity of the jurors serves this end. Finally, Hatem Fariz prays this court deny the Tribune's request for access to bench conferences and sidebars until the court has determined that the potential for danger has passed, arguably at the close of deliberations.

WHEREFORE, the defendant, Hatem Naji Fariz, respectfully requests this Honorable Court to grant the Tribune's request to videotapes, audiotapes and translations with reasonable accommodation to the clerk, deny the Tribune's request for juror information and deny the Tribune's request for access to bench conferences and sidebars until the close of the trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of March, 2004, a true and correct copy of the foregoing has been furnished by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

s/ Kevin T. Beck

Kevin T. Beck

Assistant Federal Public Defender